Supreme Court, U.S.
FILED

03 703 NOV 13 2003

OFFICE OF THE CLERK

No. 03-

IN THE

Supreme Court of the United States

ISIDRO MARTINEZ-PALEAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GEORGE SIDDELL
Attorney at Law
1648 State Street
San Diego, CA 92101
(619) 231-3991

Attorney for Petitioner

184040

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

21 pp

QUESTIONS PRESENTED

Congress has passed 8 U.S.C. § 1327, which makes the Bringing in certain Aliens that are excludable under 8 U.S.C. § 1182(a)(2), a crime. Aggravated felons are excludable under 8 U.S.C. § 1182(a)(2) and as the statute is currently applied, the offender is subject to strict liability. He is subject to prosecution under this statute, whether or not he knew the alien was excludable, or was even an aggravated felon.

Is applying strict liability under 8 U.S.C. § 1327, (Bringing in Certain Aliens) unconstitutional in being a denial of due process under the Fifth Amendment to the United States Constitution?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Petition	7
I. Strict Liability Application Of 8 U.S.C. § 1327, Violates Due Process.	8
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Koon v. United States, 518 U.S. 81 (1996) 5

Kwong Hai Chew v. Colding, 344 U.S. 590 (1952) .. 8

United States v. Flores-Garcia, 198 F.3d 1119 (9th Cir. 2000) 7, 8, 10

United States Constitution:

Fifth Amendment ..... i, 7, 8, 9

Statutes:

8 U.S.C. § 2 4

8 U.S.C. § 1182(a)(2) ..... i, 1, 4, 8

8 U.S.C. § 1324(a)(1)(A)(ii) 4

8 U.S.C. § 1324(a)(2)(b)(ii) 4

8 U.S.C. § 1327 ..... *passim*

18 U.S.C. § 111(a) 4

18 U.S.C. § 111(b) 4

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

TABLE OF APPENDICES

Page

Appendix A — Decision Of The United States Court Of Appeals For The Ninth Circuit Filed August 8, 2003 ..... 1a

Appendix B — Relevant Statutes 4a

Petitioner respectfully petitions for a writ of certiorari before the United States Supreme Court to review the decision of the 9th Circuit Court of Appeals for the United States of America, in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, in Pasadena, before Judges Kozinski, T.G. Nelson and Restani, dated August 8, 2003, affirming the verdicts and rejecting petitioner's argument that strict liability under 8 U.S.C. § 1327 is unconstitutional as being a denial of due process, is attached hereto, (Appellate Case Numbers: 01-50679 and 01-50691) (Pet.App. A). The opinion was not published. The petitioner did not move for a re-hearing.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

Jurisdiction of the Ninth Circuit Court of Appeals, over the cases herein, was derived from 28 U.S.C. § 1291, since the matter was an appeal from a criminal conviction in the United States District Court, Southern District of California.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. §§ 1327 and 1182(a)(2) (Pet.App. B).

STATEMENT OF THE CASE

In August of 2000, Mauro de Jesus Corranza, an undocumented alien, paid $800 to have a person named Don Lupe assist him in entering the United States by guiding Corranza through the mountains, on the United States side of the International Border, as did Mateo Cruz Galindo and Santiago Santos, likewise undocumented aliens.

Before August 11, 2000, Don Lupe brought each person into the United States, with each entering without inspection and documentation; Don Lupe guided each party through the hills near the International Border as agreed.

On or about August 11, 2000, while the aliens were on the United States' side of the International Border, United States Border Patrol Agents Alaniz and Walls were alerted to border sensor activations at the International Border by persons passing through same as they crossed the border. One had occurred at 5:30 pm and the other at 6:15 pm.

The agents had apprehended the aliens who had set off the sensor at 6:15 pm in the area of Honeysprings Road and Deerhorn Valley Road in Delzura, CA, 50 miles northwest of the Tecate, California, Port of Entry. At approximately 9:00 pm, the agents returned to the area to see if persons who activated the sensor at 5:30 pm, were still in the area; a new censor alert had gone off at 8:30 pm.

Prior to the agents' arrival, the above described aliens (and another alien that was being transported) were waiting in that area to be picked up. When the vehicle arrived, the driver parked it on the east side of the northbound lane, in a turn out area alongside the road; three aliens were placed in

the trunk, as well as the four other aliens being placed in the vehicle. The petitioner was the driver. Don Lupe yelled at everyone to get into the vehicle, thereafter and the vehicle was started with the headlights on.

At about the same time, the agents who were returning to the area, noticed the petitioner's vehicle and pulled the border patrol, activating the lights, to investigate why the vehicle was pulled over. Agent Alaniz approached the vehicle from the front and continued to the passenger side. Agent Walls approached from the driver's side and noticed that the engine was still running. Agent Alaniz yelled in both english and spanish for the driver to turn off the engine, as did Agent Walls. Agent Walls reached inside the vehicle and attempted to turn off the ignition key, the petitioner put the car into reverse. Agent Walls had to jog backwards with his arm in the car, all the while yelling for the driver to stop. Agent Alaniz was knocked to the ground.

Thereafter, agents Alaniz and Walls drew their revolvers and fired at the vehicle. The petitioner put the car in drive, moved forward, across the highway, crashing through a barbed wire fence and striking a tree, where the petitioner and the vehicle came to a rest.

It was later discovered that the petitioner sustained a 'through and through' gunshot wound to the face, from the agents' discharge of their weapons. The entry wound was at his left cheek near his eye and exited through his right cheek. The petitioner also sustained a gunshot wound in his left shoulder and a graze wound to the shoulder.

Law enforcement officials did a record check on the aliens being smuggled and one of the aliens, Antonio Lopez Loyala, turned out to be an aggravated felon, leading to an allegation for violation of 8 U.S.C. § 1327; the petitioner did not know this alien was an aggravated felon and therefore excludable under 8 U.S.C. § 1182(a)(2), subjecting him to criminal prosecution under 8 U.S.C. § 1327. As evident, the allegation did not arise until after law enforcement exercised their considerable records resources.

On August 22, 2000, in Case Number: 00-2665-001-JM, a thirteen count indictment was filed in the court herein, charging the petitioner and Guadalupe Palma-Marquecho with violation of 8 U.S.C. § 1324(a)(2)(b)(ii) and 8 U.S.C. § 2 (*Bringing in Illegal Aliens for Financial Gain and Aiding and Abetting*, counts 1, 3, 5, 7, 9, and 11); violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and 8 U.S.C. § 2 - (*Transportation of Illegal Aliens and Aiding and Abetting*, counts 2, 4, 6, 8, 10 and 12); and for violation of 8 U.S.C. § 1327 and 8 U.S.C. § 2 - *Assisting Certain Aliens to Enter the United States and Aiding and Abetting* that are excludable under 8 U.S.C. § 1182(a)(2), (in this case, a deported, aggravated felon), Count 13.

On January 31, 2001, a two count indictment was filed against the appellant herein, charging him with two counts of *Assault on a Federal Officer*, a violation of 18 U.S.C. §§ 111(a) and (b), case number 01-0304-001-JM.

Both cases were consolidated for trial on July 31, 2001, which began on said date, before the Honorable Jeffrey T. Miller.

On August 3, 2001, the petitioner was found guilty on all counts.

On November 21, 2001, the petitioner was sentenced. Principally the petitioner was sentenced under count 13 - 8 U.S.C. § 1327, for bringing in an aggravated felon; the offense level started at 23 and as noted above, was a strict liability issue.

The court the court applied the United States Sentencing Guidelines (USSG) and acting thereunder, set the base offense level of counts 1-13 at 23, with a +3 level upgrade due to the number of aliens and another +2 level upward adjustment for the creation of substantial risk of serious injury. The court also imposed another upward adjustment of +2 for injuries to the passengers. The total adjusted offense level for counts 1-13 was set at 30.

On counts 14 and 15, (the assault charges), the court set the base offense level at 15. On both counts the court imposed a +4 adjustment for the use of a dangerous weapon, (the car) and an additional +2 bodily injury, leaving an adjusted offense level on each count to be 21.

The court refused to grant any adjustment for "minor role" under the USSG. The court determined that petitioner played an "integral part of [the] smuggling operation". That he used his car for the ". . . purpose of transporting them points north".

The petitioner was granted a -2 Cook/Koon departure under § 5K2.0 USSG, (*Koon v. United States*, 518 U.S. 81 (1996)), due to the wound in his face and the subsequent health problems caused by the injury. The base offense level for counts 1-13 was left at 28.

The court determined the petitioner's criminal history score to be zero and granted him a Criminal History Category of I. The sentencing range of counts 1-13 was to be 78 to 97 months.

On counts 1, 3, 5, 7, 9 and 11, the petitioner was sentenced to 85 months each, with the terms to run concurrent to one another. On counts 2, 4, 6, 8, 10 and 12, the petitioner was sentenced to 60 months on each count, with terms to run concurrent. On counts 14 and 15, the court sentenced the petitioner to 85 months on each count, to run concurrent to the each other and the sentence on the other counts already imposed.

Even though the court set the basis of the sentence on count 13, it omitted actually imposing a sentence on said count; the petitioner was returned on November 29, 2001 and a concurrent 85 month sentence was imposed.

Thereafter, the petitioner filed an appeal with the Ninth Circuit Court of Appeal. In particular, the petitioner stressed that the strict liability under 8 U.S.C. § 1327 - Bringing in a Aggravated Felon (Count 13), constituted a denial of due process under the United States Constitution, in that the petitioner did not have any knowledge the alien was an aggravated felon, nor was the knowledge readily ascertainable. The strict liability had paralleled smuggling contraband, wherein a defendant is strictly liable for a harsher penalty of smuggling cocaine, when he believed he was smuggling only marijuana; the petitioner argued that under the circumstances, the information was readily available as opposed to an immigration record.

The petitioner asserted that such was a violation of the due process clause of the Fifth Amendment to the United States Constitution.

On August 8, 2003, the Ninth Circuit Court of Appeals affirmed the convictions of the petitioner. In reference to the "strict liability" argument, the court cited *United States v. Flores-Garcia*, 198 F.3d 1119, 1122-1123 (9th Cir. 2000), which holds that knowledge of an alien's prior felony is not an element of 8 U.S.C. § 1327.

REASONS FOR GRANTING THE PETITION

Is strict liability under 8 U.S.C. § 1327 - (Bringing in an Aggravated Felon) unconstitutional in being in violation of the Due Process clause of the Fifth Amendment to the United States Constitution?

The aforesaid issue present extremely important question of law since it involves the fundamental constitutionality of a statute and whether its strict liability violates due process as guaranteed by the Fifth Amendment of the United States Constitution. As indicated, a person committing alien smuggling is suddenly guilty of a separate crime, the content of which is not readily apparent or ascertainable at the time of the commission of the act. All a defendant has to smuggle the alien over the border. If it turns out the alien is also an aggravated felon and excludable, the defendant is guilty of a new crime, that was not in contemplation of the initial offense, based on information not readily ascertainable at any time during its commission. In fact, the information does not become available, until the alien's record is searched by law enforcement officials and only then is it determined that the alien is an aggravated felon and strict liability attaches.

The strict liability arising under 8 U.S.C. § 1327 is therefore a constitutional issue of extreme importance.

I. STRICT LIABILITY APPLICATION OF 8 U.S.C. § 1327, VIOLATES DUE PROCESS.

The petitioner was convicted of violating 8 U.S.C. § 1327, since one of the aliens turned out to be an alien that was also an aggravated felon and was therefore excludable under 8 U.S.C. § 1182(a)(2). The petitioner was strictly liable for the mere act of assisting the alien, even if he did not know the alien was an aggravated felon.

As noted above, the controlling case in the Ninth Circuit, is *Flores-Garcia*, *supra*, which held that knowledge of an alien's prior felony is not an element of 8 U.S.C. § 1327; the case in effect validated the strict liability nature of said statute, but only in the way it is written, not with regard to substantive constitutional due process.

The appellant contends that strict liability under 8 U.S.C. § 1327 deprives the petitioner of due process under the Fifth Amendment of the United States Constitution; that the effect of the statute is to capriciously deprive the petitioner the meaning and protection of the Fifth Amendment, which is forbidden under the constitution. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601 (1952). Realizing that this is a creature in much the same manner as holding drug smugglers strictly liable for whatever contraband they carry (i.e. smugglers believing the contraband is marijuana, when it was actually cocaine and applying increased penalties for cocaine smuggling), notwithstanding, the alien smuggler has no immediate way of knowing the alien is an aggravated felon. Drug smugglers can more easily ascertain the nature of the contraband they would be smuggling, than the

criminal record of an alien, or whether the alien has been classified as an aggravated felon and excludable for that reason. In truth and in fact, the charge does not arise until law enforcement has drawn on its considerable records resources to determine if the alien is an aggravated felon. These resources are of course not available to the offender.

In this particular case, as reflected in the facts above, the petitioner only saw the aliens for a couple of minutes when they were loaded in the back of the car. While the sentencing court denied an adjustment for minor role, it would have been impossible under the circumstances for the petitioner to determine whether one of the aliens was an excludable, aggravated felon; even if the petitioner was a major player in the matter, other than a driver, he still would not have known that an alien was an aggravated felon, since he does not have the same records resources as does law enforcement.

On the other hand, if **contraband** had been loaded in his trunk under the circumstances, the petitioner could have examined same at that time or later to determine its true nature; at least he would have had the opportunity and such opportunity would constitutionally justify the application of strict liability.

Otherwise, to allow strict liability under 8 U.S.C. § 1327 violates the due process clause under the Fifth Amendment to the United States Constitution in that a person is suddenly guilty of a greater or separate crime than the one he thought he was committing, merely because the alien he was smuggling was in fact an aggravated felon. Crimes usually involve a joint union of act and intent, that is, the intent to commit the particular crime. The petitioner asserts that

8 U.S.C. § 1327 requires no knowledge and consequently no intent to commit the crime and as such deprives the petitioner of due process.

Flores-Garcia only reached the issue of whether knowledge of the alien's status as deported/excluded aggravated felon as an element of violating 8 U.S.C. § 1327. The issue of due process was not discussed and the petitioner asserts that it should be examined by the court herein.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

GEORGE SIDDELL
Attorney at Law
1648 State Street
San Diego, CA 92101
(619) 231-3991

Attorney for Petitioner

APPENDIX

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 8, 2003

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 01-50679, 01-50691
D.C. CR-00-02665-JTM
D.C. CR-01-003040-JTM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ISIDRO MARTINEZ-PELAEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

MEMORANDUM*

Submitted August 5, 2003**
Pasadena, California

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

Appendix A

Before: KOZINSKI and T.G. NELSON, Circuit Judges, and RESTANI,*** Judge

Isidro Martinez-Palaez appeals his jury trial conviction and his sentence for multiple counts of bringing in illegal aliens for financial gain (8 U.S.C. § 1324(a)(2)(b)(ii)), transportation of illegal aliens (8 U.S.C. § 1324(a)(1)(A)(ii)), and aiding and abetting (18 U.S.C. § 2) certain aliens to enter the United States (8 U.S.C. § 1327).

Martinez-Palaez's argument based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is subject to plain error review as it was not raised in the district court. *United States v. Olano*, 507 U.S. 725, 731 (1993). There is no plain error because *Apprendi* does not apply. Defendant was sentenced to a term of 85 months, well below the statutory maximum for the alien smuggling convictions. *See United States v. Matus-Leva*, 311 F.3d 1214, 1217 (9th Cir.) (noting that *Apprendi* is not implicated in a case that does not involve sentencing factors to be decided by a judge that increase the penalty beyond the statutory maximum), *cert. denied*, 123 S. Ct. 544 (2002). Martinez-Pelaez, nonetheless, argues that the indictment violates the spirit of *Apprendi* because conspiracy was not charged. It was not necessary for the government to charge conspiracy. Martinez-Pelaez was properly charged on an aiding and abetting theory with regard to the alien smuggling charge, which put him on notice of the Government's theory. The jury found all of the facts necessary to convict Martinez-Palaez as an aider and abettor.

*** The Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

Aiders and abettors are punishable as principals. 18 U.S.C. § 2(a) (2000). Thus, the spirit of *Apprendi* is satisfied as well.

As to Martinez-Palaez's second claim, *United States v. Flores-Garcia*, 198 F.3d 1119 (9th Cir. 2000) controls. In *Flores-Garcia*, the court held that knowledge of an alien's prior felony conviction is not an element of 8 U.S.C. § 1327. *Id.* at 1122-23. Thus, appellant's argument that he may not be convicted under § 1327 because he did not know of the prior conviction of one of the smuggled aliens fails. To the extent Martinez-Palaez contends that such strict liability violates due process, an issue not addressed in *Flores-Garcia*, we decline to consider this argument as Martinez-Pelaez does not develop it or cite any authority for his position.

Finally, Martinez-Pelaez asserts that the district court erred in not reducing his sentence via a minor role adjustment under United States Sentencing Guideline § 3B1.2. Not every driver is entitled to a minor role adjustment. *See United States v. Hernandez-Franco*, 19 F.3d 1151, 1160 (9th Cir. 1999). Here, defendant owned the car that was altered for alien smuggling. It is not clearly erroneous in such a situation to conclude that defendant was not substantially less culpable than other players in the offense. *See id.*

AFFIRMED.

APPENDIX B — RELEVANT STATUTES

8 USCS § 1327

§ 1327. Aiding or assisting certain aliens to enter

Any person who knowingly aids or assists any alien inadmissible under section 212(a)(2) [8 USCS § 1182(a)(2)] (insofar as an alien inadmissible under such section has been convicted of an aggravated felony) or 212(a)(3) [8 USCS § 1182(a)(3)] (other than subparagraph (E) thereof) to enter the United States, or who connives or conspires with any person or persons to allow, procure, or permit any such alien to enter the United States, shall be fined under title 18, United States Code, or imprisoned not more than 10 years, or both.

8 USCS § 1182

§ 1182. Excludable aliens

(a) Classes of aliens ineligible for visas or admission. Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds. (A) Conviction of certain crimes. (i) In general. Except as

provided in clause (ii), any alien convicted of, or who admits having committed or who admits committing acts which constitute the essential elements of —

> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
>
> (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible

* * * *